RE YAU KIN MUN, EX P PUBLIC BANK BHD

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[BANKRUPTCY NO: 29-209-1998]
30 APRIL 1999

BANKRUPTCY: *Notice - Issue of - "office copy" of judgment - Meaning of - Whether copy must be made by office holding original judgment - Whether can be a photocopy - Whether must be certified under s. 76 of Evidence Act 1950 - Bankruptcy Rules 1969, r. 92(a) - Whether bankruptcy notice should be set aside*

BANKRUPTCY: *Interest - Limitation - Whether interest claimed in bankruptcy notice excessive - Limitation Act 1953, s. 6(3) - Whether arreas of interest beyond six years may be claimed - Determination of six-year period - Whether from date of judgment - Whether from date interest became due*

BANKRUPTCY: *Notice - Service of - Limitation - Whether notice issued within limitation period must also be served within same period - Whether notice served outside 12-year period valid - Limitation Act 1953, s. 6(3)*

BANKRUPTCY: *Execution - Leave of court - Whether necessary after lapse of six years since date of judgment - Rules of the High Court 1980, O. 46 r. 2 - Decision of previous court that leave was not necessary - Whether binding on judgment debtor here - Whether leave must be obtained before issuance of bankruptcy notice*

This was an appeal against the decision of the deputy registrar dismissing an application by the appellant ('the judgment debtor') to set aside the bankruptcy notice issued by the respondent ('the judgment creditor').

On 28 April 1986, the judgment creditor sealed an amended judgment against the judgment debtor, under which it was entitled to be paid, *inter alia*, interest from 15 July 1985 to the date of judgment and further interest from the date of judgment to the date of realisation. In 1998, just before the 12-year limitation period had set in, the judgment creditor commenced bankruptcy proceedings against the judgment debtor by issuing a bankruptcy notice based on the amended judgment.

The judgment debtor argued that the bankruptcy notice should be set aside on the following grounds: (a) the copy of the amended judgment attached to the Request for Issue of Bankruptcy Notice (Form 4) ('the Request') was not certified in accordance with s. 76 of the Evidence Act 1950; (b) the judgment creditor had claimed interest for a period of more than six years contrary to s. 6(3) of the Limitation Act 1953; (c) the bankruptcy notice was served on

the judgment debtor after the expiry of 12 years from the date on which the judgment was sealed; and (d) as more than six years had lapsed since the date on which the judgment was sealed, leave to levy execution as required by O. 46 r. 2 of the Rules of the High Court 1980 should have been obtained before issuing the bankruptcy notice.

Held:

[1] Rule 92(a) of the Bankruptcy Rules 1969 requires that the judgment creditor produce an "office copy" of the judgment before the Registrar. This means a copy issued by the office that holds the original judgment. Here, the copy of the judgment attached to the Request was a photocopy but it bore the endorsement "Salinan Yang Sah" with the original signature of the senior assistant registrar of the High Court, *ie*, the court where the original judgment was held. Such a copy would qualify as an "office copy" of the judgment. Compliance with s. 76 of the Evidence Act 1950 was thus unnecessary.

[2a] The interpretation of the second limb of s. 6(3) of the Limitation Act 1953 is that so long as the act of recovery is made before the expiry of the six-years period, there is no prohibition to the payment of arrears of interest beyond six-year from the date it became due.

[2b] For the purpose of determining the six-year period of limitation under the second limb of s. 6(3) of the Limitation Act 1953, that period is to be calculated from the date of judgment and **not** from the date stated in the judgment from which interest becomes payable. Interest in respect of a judgment debt does not become due until a judgment is actually passed and entered.

[3] Section 6(3) of the Limitation Act 1953 only prohibits the bringing of any action upon a judgment after the expiration of 12-year. To suggest that a bankruptcy notice issued before the limitation period must also be **served** within the 12 years is to read into s. 6(3) of the Limitation Act 1953 a provision that is not there.

[4] The issue of leave to execute pursuant to O. 46 r. 2 of the Rules of the High Court 1980 had already been decided in an earlier bankruptcy proceeding between the judgment creditor and judgment debtor. It was thus not open to the judgment debtor to again raise the question of leave here.

[Appeal dismissed with costs.]

Case(s) referred to:

Malaysian Soil Investigation Sdn Bhd v. Emko Holdings Sdn Bhd [1994] 1 CLJ 267 ***(foll)***

Re IDE, ex p IDE (1986) 17 QBD 755 ***(refd)***

Re Liew Kong Ken, ex p Sukorp Enterprise Sdn Bhd [1998] 2 CLJ Supp 508 ***(refd)***

Re Lim Ah Hee, ex p Perwira Affin Bank Bhd [1997] 4 CLJ 462 ***(foll)***

Re Mohd Fadzimi Yaakub, ex p United Malayan Banking Corp Bhd [1998] 1 CLJ 783 ***(refd)***

Re V Gopal, ex p Bank Buruh (M) Bhd [1987] 1 CLJ 602 ***(not foll)***

Wangsini Sdn Bhd v. Grand United Holdings Bhd [1997] 5 CLJ 664 ***(refd)***

Wee Chow Yong v. Public Finance Bhd [1990] 1 CLJ 176 ***(refd)***

Legislation referred to:

Bankruptcy Rules 1969, r. 92(a), Form 4

Evidence Act 1950, s. 76

Limitation Act 1953, s. 6(3)

Rules of the High Court 1980, O. 46 r. 2

Other source(s) referred to:

Kamus Undang-Undang, Penerbit Fajar Bakti, 1995 edn

For the judgment debtor - LH Singh (Shivdev Singh with him); M/s LH Singh & Co
For the judgment creditor - Leonard Yeoh Soon Beng; M/s Soo Thien Ming & Nashrah

Reported by Ling Hea Hoon

JUDGMENT

Clement Skinner JC:

This is an appeal against the decision of the learned deputy registrar who on 8 October 1998 dismissed the application of the appellant (hereafter the judgment debtor) to set aside the bankruptcy notice herein issued at the instance of the respondent (hereafter the judgment creditor). The facts giving rise to this appeal are as follows.

On 28 April 1986, the judgment creditor sealed an amended judgment (hereafter the judgment) against the judgment debtor and one other person. The judgment in its material parts reads as follows:

> ... IT IS THIS DAY ADJUDICATED that the defendants do pay the plaintiff the sum of RM244,640.46 (Ringgit Two Hundred Forty Four Thousand, Six Hundred Forty and Sen Forty Six only) with interest at the rate of 17.5% per annum from the 15 day of July 1985 to the date of judgment and thereafter further interest at the rate of 8% per annum from the date of judgment to the date of realisation and RM350.00 costs.

On 18 March 1998, the judgment creditor commenced these bankruptcy proceedings by issuing a bankruptcy notice based on the said judgment and requiring the judgment debtor to pay the sum of RM208,801.49 within seven days of the receipt of the bankruptcy notice which provides full particulars of how the amount claimed is arrived at. Since the amount claimed forms a subject of complaint in this appeal, I set it out here:

BUTIR-BUTIR

1. Wang pokok terhutang menurut Penghakiman bertarikh 28.4.1986		RM244,640.46
2. Campur:	Faedah pada kadar 17.5% setahun dihitung daripada l5hb Julai, 1985 hingga 28hb April, 1986 (288 hari)	RM 33,780.49
3. Campur:	Faedah pada kadar 8.0% setahun dihitung daripada 29hb April, 1986 hingga 24hb Oktober, 1986 (179 hari)	RM 9,597.95
		RM288,018.90
4. Tolak:	Bayaran yang diterima pada 25hb Oktober, 1986	RM130,050.00
		RM157,968.90
5. Campur:	Faedah pada kadar 8% setahun dihitung daripada 25hb Oktober, 1986 hingga 27hb April, 1992 (2010 hari) untuk jumlah RM114,590.46 (No. 1 - No. 4)	RM 50,482.59
6. Campur:	Kos	RM 350.00
Jumlah hutang setakat 18hb Mac, 1998		RM208,801.49

Before me, Mr. Lal Harcharan Singh, learned counsel for the judgment creditor argued that the bankruptcy notice should be set aside on the following grounds:

(a) the request for the issue of the bankruptcy notice (Form 4, Bankruptcy Rules) has attached to it a copy of the amended judgment dated 28 April 1986. This copy has not been certified in accordance with s. 76 Evidence Act and therefore the bankruptcy notice issued on the strength of such a copy is bad;

(b) the judgment debtor has claimed interest for a period of more than six years. This is contrary to the provisions of s. 6(3) Limitation Act 1953. In these circumstances, the bankruptcy notice is defective and must be set aside;

(c) the bankruptcy notice was served on the judgment debtor on 5 June 1998, a date after the expiry of 12 years from the date on which the judgment was sealed. Since by that date limitation had set in and the judgment had lapsed, such service is bad; and

(d) in the reply stage of submissions, counsel for the judgment debtor raised a further ground namely, since more than six years had lapsed since the date on which the judgment was sealed, leave to levy execution on the judgment of 28 April 1986 as required by O. 46 r. 2 Rules of the High Court (RHC) 1980 should have been obtained before issue of the bankruptcy notice. In the absence of such leave the bankruptcy notice is bad and must be set aside.

I now consider each of these grounds.

Was The Request For The Issue Of The Bankruptcy Notice Made On The Strength Of An Uncertified Copy Of The Judgment?

As a first step in initiating bankruptcy proceedings, a judgment creditor files at the High Court registry a request in Form 4 of the Bankruptcy Rules that a bankruptcy notice be issued against the judgment debtor. Such request is made in accordance with r. 92(a) of the Bankruptcy Rules 1969 which requires that the judgment creditor produce an office copy of the judgment on which the bankruptcy notice is founded. Rule 92(a) reads:

> 92 Issue of notice
>
> When applying for the issue of a bankruptcy notice, the creditor shall:
>
> (a) produce to the Registrar an office copy of the judgment or order on which the notice is founded;
>
> (b) ...
>
> (c) ...

It is the judgment debtor's case that simply producing a photocopy of the judgment to the registry is not enough. To enable a court to act on the request, a certified copy of the judgment must be submitted. Such certification must be done in accordance with s. 76 of the Evidence Act failing which the bankruptcy notice should not be issued as an uncertified copy of a judgment is not admissible as evidence of a valid judgment entered against the judgment debtor.

This argument did not find favour with the deputy registrar who could not find any provision in the Bankruptcy Act or the Bankruptcy Rules that requires the copy of the judgment to be certified in accordance with s. 76 of the Evidence Act. In my view the deputy registrar was correct. Rule 92(a) requires that the judgment creditor produce an "office copy" of the judgment. There appears to be no definition of the words "office copy" in the Bankruptcy Act or the Rules. There is however a definition of these words in *Kamus Undang-Undang* published by Penerbit Fajar Bakti Sdn. Bhd. 1995 edn. as being "a copy that is issued by the office that holds the original copy." In the present case, I have examined the request for issue of a bankruptcy notice filed by the judgment creditor. The copy of the judgment attached to the request is a photocopy but it bears the following endorsement "Salinan Yang Sah" with the original signature of the senior assistant registrar of the High Court, Ipoh. It is also apparent from the record that the judgment on which this bankruptcy notice is issued is a judgment of the High Court in Ipoh obtained in Suit 1438 of 1985. In these circumstances, the original copy of the judgment must be held in this High Court registry. As the copy of the judgment produced to the registry has been certified as a true copy by the senior assistant registrar of this court, such copy would in my judgment qualify as an "office copy" of the judgment. I therefore find nothing irregular in the issue of the bankruptcy notice herein.

Has The Judgment Creditor Claimed More Than Six Years Interest?

The amended judgment was sealed on 28 April 1986. It provides that the judgment sum would carry interest "at the rate of 17.5% per annum from 15 July 1985 to the date of judgment and thereafter further interest at the rate of interest at 8% per annum from the date of judgment to date of realisation and RM350 costs".

Section 6(3) Limitation Act reads:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

It is the submission of counsel for the judgment debtor that since the judgment specifically states that interest is payable from 15 July 1985, that is the date on which interest became due on the judgment. If that be the case, then the six years period mentioned in the second limb of s. 6(3) above begins to run from 15 July 1985 and would have expired on 14 July 1991. However, as can be seen from the particulars endorsed on the bankruptcy notice, interest has been claimed up to and including 27 April 1992. Clearly, submits counsel, the amount of interest claimed in the bankruptcy notice is excessive and therefore it is defective and must be set aside.

Counsel then referred to the case of *Wangsini Sdn. Bhd. (formerly known as Hillway Industries Sdn. Bhd.) v. Grand United Holdings Bhd.* [1997] 5 CLJ 664; [1997] 3 AMR 2976 where the court there held, *inter alia*, that for the purposes of calculating when interest begins to run on a judgment, the dates stipulated in the judgment is the date from which interest became due and therefore the six years period began to run from that date.

Mr. Leonard Yeoh learned counsel for the judgment creditor submits that the six years period is to be calculated from the date of the judgment. If his submission is accepted, the judgment creditor did not claim more interest than what it is entitled to, because the particulars endorsed on the bankruptcy notice clearly shows that what is claimed by way of interest does not exceed six years from the date of the judgment. In support of his submission counsel cites the cases of *Malaysian Soil Investigation Sdn. Bhd. v. Emko Holdings Sdn. Bhd.* [1994] 1 CLJ 267 where it was held that s. 6(3) of Limitation Act did not prohibit the payment of arrears of interest due on a judgment beyond the six years after they became due as long as the act of recovery is made before the expiry of the six years period; and *Re Lim Ah Hee, Ex P Perwira Affin Bank Bhd.* [1997] 4 CLJ 462 which followed the decision in *Malaysian Soil Investigation Sdn. Bhd. v. Emko Holdings Sdn. Bhd. (supra).*

I must with respect say that I concur with the decision in *Malaysia Soil Investigation Sdn. Bhd.* and *Re Lim Ah Hee* on the interpretation they put on the second limb of s. 6(3) of the Limitation Act, namely, so long as the act of recovery is made before the expiry of the six years period, there is no prohibition to the payment of arrears of interest beyond six years from the date it became due. However, with regard to the submission of counsel for the judgment debtor that the six years is to run from the date on which the judgment states the interest becomes payable, which in this case is 15 July 1985, I regret I do not agree with that submission. It is my view that for the purpose of determining the six years period of limitation under the second limb of s. 6(3), that period is to be calculated from the date of judgment and not from the date the interest becomes payable. In my judgment, the words "from the date on which the interest became due" must refer to the date of judgment and not the date stated in the judgment from which interest became payable because interest in respect of a judgment debt does not become due until a judgment is actually passed and entered. It is only from that date that the right to be paid interest on the judgment debt arises. Therefore, notwithstanding that a judgment may speak of interest becoming payable from a date earlier than the judgment date, for the purpose of determining the limitation period, it is from the date of the judgment that the six years begins to run since that is the date when interest became due on the judgment debt.

It is my view that if the six years is to be calculated from the date suggested by counsel for the judgment debtor, namely, from the date on which the interest is stated in the judgment to be payable from, it could lead to possible injustice where, for example, a plaintiff in bringing an action prays for interest on the judgment debt from the date on which he files his action, but is then delayed for some reason or other from finally sealing a judgment until some six years later. If the six years is to be calculated from the date the interest becomes payable, he will not be able to recover any interest on his judgment debt as by then it will be caught by the second limb in s. 6(3).

It follows from what I have said that I do not consider the amount of interest claimed in the bankruptcy notice to be excessive because applying the decision in the *Malaysian Soil Investigation* case, the act of recovery occurred well within the six years period and secondly, if the six years is calculated from the date of judgment, the amount of arrears of interest claimed did not exceed six years.

Must The Bankruptcy Notice Be Served Within The 12-Year Limitation Period?

It is the contention of the judgment debtor that once 12 years have lapsed from the date of judgment, the judgment is a dead letter. Therefore, if bankruptcy proceedings are to be taken on a judgment, it is counsel's submission that not only must the bankruptcy notice be issued but it must also be served within the 12 years period. In support of his contention, counsel relies upon the decision in *Re: V. Gopal Ex p Bank Buruh Berhad* [1987] 1 CLJ 602, where it was held that for the purposes of determining whether or not six years had elapsed since the obtaining of judgment so as to ascertain whether leave to execute the judgment was required under O. 46 r. 2 RHC, the relevant date is the date of service of the bankruptcy notice.

In our present case, the bankruptcy notice was issued on 18 March 1998, which was slightly more than a month before the 12 years limitation period set in. It is counsel's submission that the bankruptcy notice had to be served before 27 April 1998 because after that date, its foundation is gone as the judgment on which it is based no longer exists for all intents and purposes. I regret I do not agree with this submission. Firstly, s. 6(3) Limitation Act only prohibits the bringing of any action upon a judgment **after** the expiration of twelve years. Therefore, to suggest that a bankruptcy notice issued before the limitation period must also be served within the twelve years is to read into s. 6(3) a provision which is not there. I see no justification for so doing. Secondly, in the case of *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd.* [1990] 1 CLJ 176; [1989] 3 MLJ 508, Edgar Joseph J (as he then was) carefully explained why the decision in *Re: V. Gopal* regarding the

material time from which to calculate the six years period after a judgment had been entered could not be followed. His lordship pointed out that the learned judge in that case had misread the decision of the Court of Appeal in *Re: Ide Exp. Ide* and went on to say that in principle it was fairer to calculate the six years from the date of issue of a bankruptcy notice rather than the date of its service because delays in effecting service are often not the fault of the creditor and indeed could well be because the debtor is deliberately avoiding service.

For the above reason I find no merit in the submission of the judgment debtor on this point.

Was Leave Of Court Necessary To Levy Execution Pursuant To O. 46 r. 2 RHC 1980 Before Issue Of The Bankruptcy Notice?

As indicated earlier, when replying to submissions of the judgment creditor, counsel for the judgment debtor raised for the first time the objection that as the amended judgment on which the bankruptcy notice is based was obtained on 28 April 1986 and the bankruptcy notice herein was issued on 18 March 1998, well over six years had elapsed since the date of the judgment. In these circumstances, leave to levy execution on the judgment should have been obtained pursuant to O. 46 r. 2 RHC failing which the judgment upon which the bankruptcy notice is based cannot be described as being a final judgment where-on execution had not been stayed. If execution cannot issue on the judgment, no bankruptcy notice can issue also on that judgment. Counsel for the judgment debtor relies on the decision in *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd. (supra)* as well as the following High Court decisions which followed that decision, namely, *Re: Mohd. Fadzimi Yaakub, Ex P United Malayan Banking Corp. Bhd.* [1998] 1 CLJ 783, *Re: Liew Kong Ken Ex P Sukorp Enterprise Sdn. Bhd.* [1998] 2 CLJ Supp 508 and a decision of this court in Ipoh High Court BP.29-350-98.

Learned counsel for the judgment creditor does not deny that no leave has been obtained to levy execution on the judgment but submitted that there had been earlier bankruptcy proceedings between the judgment creditor and judgment debtor in the High Court in Ipoh in BP.29-267-96. In those earlier proceedings, the judgment debtor raised the issue of leave to execute pursuant to O. 46 r. 2 but failed in their argument as the learned judge there held that no leave was required. Learned counsel then produced a copy of the decision in BP.29-267-96. Counsel explains that armed with such decision in their favour and relying on the same, the judgment creditor issued the present bankruptcy notice without having obtained leave. Counsel says he is entitled to assert that judgment in these proceedings. Counsel also points out that the

judgment creditor would be gravely prejudiced if this issue were allowed to be raised now at such a late stage since the limitation period of 12 years would have set in and it would be too late to commence fresh bankruptcy proceedings.

Having given this matter considerable thought, I find that is not open to the judgment debtor to raise the question of leave here. Having raised this same issue in earlier bankruptcy proceedings between the same parties before another court and having failed there, the judgment debtor is bound by that earlier decision and cannot be allowed to relitigate that very same issue here.

In the result, this appeal is dismissed with costs.